Highland Plastics, Inc. *and* Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 2-CA-16518

May 26, 1981

DECISION AND ORDER

On September 29, 1980, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs. The Respondent also filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, to modify his remedy,[3] and to adopt his recommended Order, as modified herein.[4]

1. On the afternoon of June 5, 1979,[5] 11 of the Respondent's first-shift employees, including Doug Koehler and Brian Nolan, went on strike and established a picket line outside the Respondent's premises. Shortly thereafter, the Respondent's plant manager, Bertha, informed these strikers that if they did not report to work the following morning the Respondent would assume that they had quit. Later that same day the employees contacted union organizers who came out to the picket line and passed out authorization cards. One of the organizers then met with Bertha and requested recognition based on the signed cards. Bertha refused, stating that these employees had quit. Subsequently, Bertha met with the supervisors and decided to terminate the striking first-shift employees, including Koehler and Nolan, for allegedly blocking trucks. Koehler and Nolan reported to the picket line somewhere between 7 and 8 a.m. on June 6. At approximately 7:30 a.m., all of the striking first-shift employees, except Koehler and Nolan, reported for work. The Respondent's supervisor, Taylor, informed them that they had all been terminated. Taylor testified that if either Koehler or Nolan had attempted to report for work he would not have permitted them to do so. In the early afternoon, Bertha told the strikers present on the picket line, including Koehler, that their jobs were available and that the Respondent wanted them to return to work. Bertha next telephoned the remaining striking employees and relayed the same message to them. The following day the Respondent mailed the striking employees a letter stating that their jobs were "at this time" available.[6] Neither Koehler nor Nolan made an attempt to return to work.

The Administrative Law Judge found, and we agree, that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging the nine employees who reported for work on June 6. We disagree, however, with the Administrative Law Judge's conclusion that Koehler and Nolan were not unlawfully discharged because the record failed to establish that the Respondent had directly informed them of their termination or that they had otherwise become aware of the Respondent's decision to discharge them. He also noted that the Respondent had informed Koehler and Nolan on June 6 and 7 that their jobs were available. In so finding, the Administrative Law Judge found the present case to be distinguishable from *Martin Arsham Sewing Co.*, 244 NLRB 918 (1979), where the Board found that an employer violated Section 8(a)(1) and (3) by discharging four employees despite the fact that the employer did not directly communicate to the employees that they had been discharged.

Contrary to the Administrative Law Judge, we find that the facts here are similar to those in *Martin Arsham Sewing Co.*, and that its rationale is applicable. In *Martin Arsham Sewing Co.*, the employer told a group of employees that whoever signed union authorization cards would "leave with the Union or stay and work." Four employees were not present when the employer made his discharge statements. The Board concluded that since those remarks were directed at all card signers, and the employer could reasonably have expected that its statements would be communicated to the four absent employees, and that in fact they were, the

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Administrative Law Judge, in finding that the Respondent's president violated Sec. 8(a)(1) of the Act by brandishing a gun while at the picket line, erroneously noted that there had been no preceding acts of violence by the pickets. The record shows, however, that earlier that day one of the pickets had thrown a punch at employee Schiavone and had thrown a crate under his car when he attempted to cross the picket line. We find that these acts, which the Respondent was not aware of, were not so serious that the Respondent's president's act of carrying a gun with him when he went out to the picket line would reasonably have appeared as only a permissibly defensive gesture.

[3] See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[4] We have modified the Administrative Law Judge's recommended Order to include the name Mark Hayes which was inadvertently omitted from the make-whole provision.

[5] All dates are in 1979.

[6] We agree with the Administrative Law Judge, for the reasons stated by him, that this letter did not constitute a valid offer of reinstatement. On July 3, however, the Respondent made a valid offer of reinstatement to most of the striking employees, including Koehler and Nolan. The latter two did not respond to this offer.

employer had unlawfully discharged the four employees.

Under the circumstances, in this case, we likewise find that the Respondent both intended to discharge Koehler and Nolan and indeed considered them to have been discharged along with the others, as evidenced by Taylor's testimony. We further find it reasonable to infer, from the fact that Koehler and Nolan were at the picket line either at the time the discharges were announced or shortly thereafter, that their fellow strikers informed them of their discharges. Accordingly, we find that Koehler and Nolan were discharged by the Respondent in violation of Section 8(a)(1) and (3) of the Act.

2. We agree with the Administrative Law Judge's finding that the Respondent's unfair labor practices were sufficiently widespread and serious under *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), to warrant issuing a retroactive bargaining order. It has long been established that the threat of loss of employment, discharge of union adherents, and the threat of plant closure, all of which occurred herein,[7] are likely to have a lasting inhibitive effect on a substantial percentage of the work force, and therefore are considered "hallmark" violations which support the issuance of a bargaining order, unless some significant mitigating circumstances exist.[8] No such circumstances exist in this case. Although the Respondent has apparently experienced substantial employee turnover since it committed the unfair labor practices described above, we find such turnover does not warrant withholding a bargaining order. The Board has consistently held that the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed and, therefore, to delete such an order on the basis of employee turnover would reward, rather than deter, an employer who engaged in unlawful conduct during an organizational campaign.[9] Accordingly, we find that a bargaining order is justified because the Respondent's unfair labor practices had a "tendency to undermine majority strength and impede the election process."[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Highland Plastics, Inc., Newburgh, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs accordingly:

"(a) Make whole Michael Phillips, Doug Koehler, Brian Nolan, Steven Olsen, Dale Rehnberg, Kevin Fitzpatrick, Mark Hayes, Larry Embler, Tom Dolan, Walter Johnson, and James Fichera for any loss of earnings they may have suffered by reason of the discrimination practiced against them in the manner set forth in the section herein entitled 'The Remedy.'"

2. Substitute the attached notice for that of the Administrative Law Judge.

[10] *Gissel Packing Co., Inc., supra* at 613–614.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or threaten to discharge our employees for engaging in a strike or in union activities or otherwise discriminate against them in order to discourage them from being or becoming members or supporters of Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT threaten to close or move our plant if the Union is selected as the collective-bargaining representative by our employees.

WE WILL NOT brandish a gun while employees are engaged in protected concerted activity or drive an automobile into our employees while they are picketing.

[7] The Respondent also violated Sec. 8(a)(1) by its agent's brandishing a gun while at the picket line and driving a van into picketing employees.

[8] See, e.g., *Patsy Bee, Inc.*, 249 NLRB 976 (1980); cf. *N.L.R.B.* v. *Jamaica Towing Inc.*, 602 F.2d 1100 (2d Cir. 1979), wherein the Second Circuit, while denying enforcement of the Board's bargaining order, expressly recognized the special significance of the aforementioned "hallmark violations" as factors justifying a bargaining order.

[9] *Jamaica Towing Inc.*, 247 NLRB 226 (1980), and *Glomac Plastics, Inc.*, 241 NLRB 348 (1979). Further, we respectfully continue to disagree with those courts of appeals which have expressed a contrary view of employee turnover as a factor to be considered in determining the propriety of a bargaining order. Moreover, we note that at least one such court, the Second Circuit, has indicated that employee turnover is of little significance in cases where, as here, the respondent has committed various hallmark violations of the Act. *N.L.R.B.* v. *Jamaica Towing Inc., supra.*

WE WILL NOT refuse to bargain collectively with the Union concerning terms and conditions of employment of our employees in the following appropriate unit:

All full time and regular part time production and maintenance employees employed by us at our Newburgh, New York, facility, including cutters, benders, bellers, packers, shippers and welders, but excluding office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT unilaterally grant wage increases, distribute free turkeys to our employees, or otherwise unilaterally change any other term or condition of employment of our employees, without first notifying the Union and bargaining collectively with it in good faith concerning such proposed changes; provided that, nothing herein shall require us to rescind any wage increase or benefit which we have previously granted.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL make whole Michael Phillips, Doug Koehler, Brian Nolan, Steven Olsen, Dale Rehnberg, Kevin Fitzpatrick, Mark Hayes, Larry Embler, Tom Dolan, Walter Johnson, and James Fichera, for any loss of earnings they may have suffered by reason of our discrimination against them, plus interest.

WE WILL, upon application, offer to all those employees who participated in the strike which began on June 5, 1979, and who have not been reinstated, immediate and full reinstatement to their former positions of employment or, if those positions are no longer available, to substantially equivalent employment, without prejudice to their seniority or other rights and privileges previously enjoyed, dismissing if necessary, any persons hired as replacements on or after June 6, 1979, and WE WILL make whole those employees for any loss of earnings they may have suffered by reason of any refusal on our part to reinstate them, plus interest.

WE WILL, upon request, bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement.

HIGHLAND PLASTICS, INC.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: Pursuant to charges and amended charges filed by Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, a complaint was issued by Region 2 of the National Labor Relations Board on August 7, 1979,[1] alleging that Highland Plastics, Inc., herein called Respondent violated Section 8(a)(1), (3), and (5) of the Act, by discharging some 19 named employees because said employees joined and assisted the Union, and because they engaged in a strike from June 5 to on or about July 20; by threatening employees that Respondent's facility would be closed or relocated if they selected the Union as their collective-bargaining representative; by appearing during picketing and brandishing a gun; by assaulting picketing employees by driving an automobile van into employees when they were picketing; by bypassing the Union and dealing directly with striking employees by offering them a 10-cent-per-hour wage increase if they would abandon their strike and return to work; and by refusing to recognize and bargain with the Union as the exclusive representative of its employees in an appropriate unit.

The hearing was heard before me in Goshen, New York, on January 8–10 and 22–25, 1980.

During the course of the hearing, the General Counsel amended the complaint to add some additional discriminatees, and to specify the reinstatement dates for the alleged discriminatees, and added allegations that Respondent by granting wage increases and distributing free turkeys to employees on Thanksgiving violated Section 8(a)(1) and (5) of the Act, and, by denying a wage increase to employee Larry Embler, violated Section 8(a)(1) and (3) of the Act.[2]

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

[1] All dates are in 1979 unless otherwise stated.

[2] In his brief, the General Counsel, after reviewing the record, agreed and submitted that employees Godfrey, Wajda, Wheeler, Fredell, Decker, Schiavone, Ibbotson, and Miller were never discharged by Respondent. I shall treat this statement as a request to amend the complaint to delete these individuals as discriminatees from said complaint, which request I hereby grant.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, is engaged in the manufacture and distribution of plastic fittings and related products at its facility in Newburgh, New York. During the fiscal year ending October 31, 1978, Respondent purchased and received at its Newburgh, New York, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Events of June 5, 6, and 7—Employee Strike, Union Appears, Respondent's Alleged Discharge of Employees, and Attempts To Offer To Reinstate Them*

On June 5, a number of Respondent's employees met and drew up a list of demands concerning various improvements in working conditions. It was agreed that these demands were to be presented to Respondent.

Accordingly, a group of first-shift employees,[3] met with Ed Bertha, Respondent's plant manager, and Plant Foreman and Supervisors Steve Warran and Terry Taylor. Steve Olsen, one of the employees, read off a list of demands, including a 30-cent-per-hour increase, additional sick days, personal days, holidays, and other improvements in working conditions. Bertha, after listening to these demands, told the employees that their demands would be conveyed to Jack King, Respondent's principal shareholder.

Most of the first-shift employees then punched out at or about 3:45 p.m.,[4] and established a picket line outside Respondent's premises.[5]

The four second-shift employees, Al Guinta, Terry Drouin, Guy Banker, and Charles Shapiro, reported for work, punched in, and worked for a few minutes. At or about 4:15–4:30 p.m., they punched out and joined the first-shift employees on the picket line. At or about 4:45 p.m., Bertha, Warran, and Taylor approached the employees on the picket line. Bertha asked Olsen what was happening. Olsen replied that unless Respondent met the employees' demands they were not going to work. Bertha then addressed himself to the four second-shift employees, Banker, Shapiro, Guinta, and Drouin, who were scheduled to be at work at that time; and told them that, if they did not return to work, he would assume that they had quit. One of these employees asked what if they were sick. Bertha replied that they did not look sick to him and if they were sick they had better bring in a doctor's note. The employees did not resume work.

Bertha then addressed himself to the first-shift employees and informed them that, if they did not report to work the following morning, he would assume that they had quit.

At or about 4:30 p.m., Fitzpatrick made a call to the Union. He spoke to Union President Al Schueler and told him that there was some sort of labor dispute going on and asked for assistance from the Union. As a result of this conversation, at or about 5:15 to 5:30 p.m. on June 5, Schueler and Joe Arnita, organizer for the Union, arrived at the plant. They discussed with the employees on the picket line the possibility of the Union representing the employees and passed out authorization cards to sign. They told the employees to sign the cards if they wished the Union to represent them. All the employees on the picket line at the time, totaling 12, after reading the cards, filled them out, signed them, and returned them to Arnita or Schueler.[6] Arnita asked the employees how many employees were working for Respondent and received varying estimates ranging from 25 to 30. Arnita told the employees that the union officials would be going into the plant to request recognition from Respondent.

Schueler then went inside the plant and met with Bertha. Schueler introduced himself to Bertha, told him that the Union represented a majority of his employees, and that he had cards signed by these employees. Bertha responded that it did not make any difference, that these employees did not work for Respondent since they all had quit. Schueler replied that he probably could straighten out the problem if he could speak to the owner. Bertha answered that the owner, Jamie King, was unavailable. He added that King was very antiunion and that before King would negotiate with a Union he would rather close the doors and go out of business. Schueler again requested to see King, and Bertha replied that he would pass his request on to King. Schueler informed Bertha that he would be glad to return the men to work immediately if these problems could be resolved. Bertha responded, "No way, they all quit."[7]

Shortly thereafter, at approximately 6 p.m., Bertha, Taylor, and Warran met to determine what action, if any, they were going to take against the employees. Warran obtained all the employees timecards and they were separated into three groups. One group, consisting of the four second-shift employees, Banker, Guinta, Shapiro, and Drouin, since they did not return to work, was considered to have quit. The second group, consisting of Olsen, Phillips, Hayes, Johnson, Fitzpatrick, Dolan, Embler, Rehnberg, Fichera, Nolan, and Koehler, was terminated because, according to Respondent's witnesses,

[3] At the time Respondent employed three shifts of employees: a day or first shift consisting of the bulk of Respondent's employees, ran from 8 a.m. to 4 p.m.; a second shift consisting of four employees running from 4 p.m. to midnight; and a third or night shift from midnight to 8 a.m.

[4] Their shift ended at 4 p.m.

[5] The first-shift employees present and on the picket line were Kevin Fitzpatrick, Tom Dolan, Michael Phillips, Mark Hayes, Walter Johnson, Doug Koehler, Dale Rehnberg, Brian Nolan, Larry Embler, James Fichera, and Olsen.

[6] The card signers on June 5 were Rehnberg, Phillips, Shapiro, Banker, Olsen, Johnson, Drouin, Hayes, Guinta, Fitzpatrick, Embler, and Dolan.

[7] The above is based on Schueler's version of his conversation with Bertha, which I credit, as I found him to be a more forthright and believable witness than Bertha. Bertha denied making any statements concerning the plant closing or King's attitudes towards the Union, but admitted that, in response to Schueler's demand for recognition, that he did inform Schueler that "some" of the employees did not work there anymore.

they were seen "blocking" trucks and interfering with company business.[8] Respondent decided to take no action against the third group, consisting of the remaining employees. Taylor was authorized by Bertha to inform the affected employees of Respondent's actions. He did not inform the second-shift employees of Respondent's decision with respect to their status, but he admitted that, if they arrived for work, he would tell them that Respondent was sorry, that they figured the employees had quit, and that "they would be out."

Later that evening, Tom Dolan came to the plant and asked Taylor if he could use the phone. Taylor said that he did not want him in the building because as far as Respondent was concerned he did not work there anymore. Later that night, Fitzpatrick, who had been informed by Dolan of Taylor's actions, called and asked Taylor what was going on. Taylor informed Fitzpatrick that he did not work there anymore and not to bother to come in the next day. Taylor did not inform either Dolan or Fitzpatrick of why Respondent had decided that they "didn't work there anymore." Fitzpatrick informed employees Hayes and Schiavone that he had been terminated. A number of employees, namely, Keith Lund, John Godfrey, Pete Schiavone, Ed Wajda, Gary Fredell, and Bob Decker, worked for Respondent on June 5 notwithstanding the presence of the picket line of employees.

Sometime between 7 and 8 a.m. on June 6, Fitzpatrick, who had the day before been given additional cards to distribute by Arnita, gave cards to employees Doug Koehler, Pete Schiavone, James Fichera, and Brian Nolan on the picket line. Present on the line also were other employees: Olsen, Phillips, Embler, Hayes, and Rehnberg. Fichera, Nolan, Koehler, and Schiavone signed the cards in front of Fitzpatrick and returned them to him at that time.

At or about 7:30 a.m., a number of the employees on the picket line attempted to report to work.[9] Taylor was standing at the door which was locked. He admitted that he was there to make sure that anyone who Respondent had decided had either quit or was terminated would not be let in. Olsen, Phillips, Hayes, Embler, Johnson, Dolan, Rehnberg, and Fichera came to the door and attempted to come in. Olsen asked to come in, and Taylor replied that the employees did not work there anymore and that they were all terminated. Olsen insisted that, if the employees were fired, then they were entitled to their checks immediately. Taylor replied that they would receive their paychecks at the regular time of 11:30 a.m., and they should return at that time.[10]

Later in the day of June 6, Respondent had second thoughts about its decision to terminate certain of its employees. Bertha testified that, when the decision was made on June 5, he informed Jamie King of his contemplated action and that King had concurred, but suggested verifying the decision with legal counsel. Bertha contacted an attorney who allegedly told him Respondent's action seemed proper, but he would check into it some more. Sometime on June 6, Bertha met with his attorney and was told that Respondent had made a big mistake. Bertha then began to try to contact people to tell them that their jobs were available. Sometime in the early afternoon of June 6, Bertha went out to the picket line to give the employees their paychecks. Bertha addressing them in a group told them that their jobs were available or still open and Respondent wanted them to come back to work. One of the strikers asked what the pay would be, and Bertha replied "the same as before." One of the strikers told Bertha that they would not return until their demands were met. Present in this group of employees were Olsen, Phillips, Hayes, Koehler, Fitzpatrick, Johnson, Dolan, Rehnberg, and Embler. Bertha also tried to contact the remaining employees by phone. He called employees who were not terminated as well, since there was such confusion as to who had been terminated and or been notified of such termination. Bertha spoke to Guy Banker, James Fichera, Al Guinta, Pete Schiavone, Shaun Seeley, and Brian Nolan on the phone on June 6. He told them that their jobs were available and he wanted them to come back to work. Bertha did not recall the response of any of these individuals.[11]

Bertha also spoke to Fredell and Ibbotson, told them the same thing, and they responded that they would be traveling together and would try to get in to work. Keith Lund and Ed Wajda were also spoken to and replied that they would come in if they could. Sherry Wheeler told Bertha that she was a little afraid to come in, but that she would come in if she could get through the picket line.

Bertha testified that he called Charles Shapiro and left a message that his job was available and that Respondent wanted him to come back to work.[12]

Bertha did not try to contact Terry Drouin, as Taylor had told him that he had contacted Drouin and that Drouin had told Taylor that he would be coming into work the next day. Bertha did not call Anthony Madia since he had been informed that Madia had resigned.

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[8] The evidence presented by Respondent concerning the "blocking" of trucks and interfering with company business consisted of testimony that Respondent's witnesses observed some trucks pull up, some employees speaking to the drivers, and the drivers then refusing to make the deliveries. Respondent adduced no evidence of what was said to the drivers, nor of any physical blocking of these trucks by the pickets. The only evidence in the record of what was said to drivers was the testimony of Rehnberg, who as a shipping employee knew the drivers who customarily make deliveries to Respondent. He testified, without contradiction, that he merely told these drivers that there was a strike and a picket line up, and that the drivers replied that they were Union also and would not cross the picket line.

[9] Arnita had instructed them the night before to try to report for work on June 6, and the Union would try to negotiate with the Company.

[10] The above recitation of facts is based on a compilation of the testimony of Taylor, Hayes, Embler, and Dolan, which is essentially not in dispute. Embler is the only witness who testified that Fichera was present during this incident. Fichera was not called to testify. Taylor did not mention Fichera being present, but did not deny that he was there. All of Respondent's witnesses agree that they had decided to terminate 11 employees for allegedly blocking trucks and interfering with company business, but could only name 10 individuals not including Fichera. I find, particularly in the absence of a denial by Taylor that he was present on June 6, that Fichera was the 11th person whom Respondent decided to terminate and that he was among the group of employees who attempted to report to work and were told by Taylor that they were terminated.

[11] Banker, Fichera, Schiavone, Seeley, and Nolan did not testify.

[12] Shapiro did not testify.

The next day, June 7,[13] Bertha sent a letter by certified mail, return receipt requested, to all employees. The letter reads as follows:

> In light of the recent and ongoing work stoppage at the Highland Plastics plant, it has become necessary for us to take action to keep our business operating.
>
> This is to notify you that your jobs are at this time available and any of you who report for work will be put back on the payroll. This is to further advise you that effective immediately, we will begin to hire permanent replacements to fill the plant work requirements.

Subsequently, on July 3, 1979, Respondent sent another letter to all employees who had not returned to work with the exception of Phillips and Olsen.[14] This letter, signed by Bertha, reads as follows:

> As we told you personally on June 6th, and confirmed by letter the next day, the plant is operating and work is available. We have several openings at the present time and rather than hire additional permanent replacements, we invite you to return to work.
>
> Please let me know as soon as possible of your decision.

Employees Banker and Guinta returned to work on June 18, Shapiro, Fichera, and Dolan on July 5, Embler and Drouin on July 9, Phillips on July 26, Hayes on July 30, and Fitzpatrick in mid-August.

1. The gun incident

At 11 a.m., on June 6, a New York Telephone Company truck drove up to Respondent's premises in order to make a delivery. The driver stopped when a number of pickets approached him. The pickets informed the driver that the employees were on strike. The driver replied that he would not cross the picket line.

Jamie King then came out of the main door of Respondent's premises carrying a loaded gun in his hand. He walked to the truck with the gun at his side and climbed up on the running board of the truck. He still had the gun in his hand, while he had a conversation with the driver. He did not at any time raise or point the gun at anyone. According to King,[15] he said hello to the driver, who then told King that he could not go through the picket line, because he was scared. King replied that he understood the driver's right not to cross the line and suggested that he give King a call and King would deliver anything the driver needed to the customer's yard. King denied that he asked the driver to go through the line, as well as denying that the reason that he took the gun out with him was to assist the truck in crossing the line.

According to King, he took the gun with him out to the telephone truck because he was "trying to protect myself, my employees and my building."

King testified further that when he arrived at the plant on that morning he was told by Taylor that a customer named Mike Weiss had come to the plant to make a pickup, that the pickets had given him a "hard time" coming through the line, and that it was necessary to call the police in order to get Weiss out of the plant. Taylor also informed King that some employees who wanted to come to work had attempted to force their way into the plant. In addition, King was told about some employees who had allegedly called in and said that they were afraid to come in to work because of threats by pickets. King admits however, that there had been no violence at the time of the incident. King testified further, "I might add that I had the feeling that if they knew there was someone here armed properly, they wouldn't do all these violent things." When asked which violent things, he responded, "like the threats to the men."

After King's conversation with the driver, he got off the running board, turned around, and walked into the plant, still carrying the gun but not pointing it at anyone. Shortly thereafter, the police arrived and asked King about the gun. King showed the police his permit. The police requested that he not bring the gun out to the picket line again. King replied that he was only trying to protect his property and employees. The police replied that they could do that and it was their job. King agreed not to carry the gun again. King took the gun home that day and did not bring it back to the plant. The police went out to the picket line and informed the employees that King had a permit for the gun and that he would not be bringing the gun out anymore.

2. The van incident

On June 7, at approximately 12 noon, employees Olsen, Phillips, Rehnberg, and Johnson were picketing in front of driveway 2. They were walking in a clockwise circle about 5 feet apart. Jamie King, driving a rented Avis van, drove up on Jeanne Drive towards driveway 2. He did not blow his horn or turn on his directional signal, but did slow down to approximately 3–5 miles per hour as he turned into the driveway towards the pickets. He drove through the driveway and in the process struck Phillips, Olsen, and Rehnberg with various parts of the van as they were attempting to move out of the way. Phillips and Rehnberg fell to the ground. Rehnberg immediately got up, but Phillips remained on the ground holding his ankle. King stopped the van and walked over towards Phillips. Rehnberg called King a "murderer." King went back inside the plant. An ambulance was called and Phillips was taken to the hospital. X-rays were taken of his back, head, and ankle and he was released from the emergency room with a sprained ankle. The next day he was in pain from his back, and was checked into the hospital by his private physician for

[13] On June 5, David Ibbotson was given a card by Mike Phillips on the street away from the picket line. Phillips told him to read it and sign it if he agreed with everything that was on it. Ibbotson signed the card and dated it on June 7, and dropped it off at Phillips' house on that evening.

[14] Olsen was terminated by letter on July 3, 1979, for his picket line misconduct. The General Counsel does not allege this action to be in violation of the Act. Phillips was offered reinstatement by letter dated July 12, but received a letter of reprimand for his picket line misconduct. The General Counsel does not contest the legality of this action either.

[15] The driver did not testify.

treatment of this injury, and remained in the hospital until June 16. Neither Rehnberg nor Olsen was injured as a result of being struck by the van.[16]

3. The alleged threat to close the plant

On June 6, in the evening, Warran came out to the picket line and spoke to employees Hayes and Embler. He told Hayes and Embler that he did not think that Respondent could afford to meet the demands of the Union, and that they would have to close or move. Warran also indicated that he had heard from someone inside the plant that the Company would rather close down and move than accept a Union.[17]

4. The offer of a 10-cent-per-hour wage increase

On June 7, Jack King, Respondent's chief operating officer, arrived at the plant. Olsen and Phillips requested a meeting of employees with Jack and Jamie King without Bertha. The meeting was held in the morning on June 7. The employees complained about Bertha and his management style. Jack King asked the employees to return to work, and Olsen repeated his insistence that the demands previously presented on June 5 must be met before the employees would return to work. Jack King asked for a brief recess, and then returned with Bertha and Jamie King. Jack King offered the employees a 10-cent-per-hour, across-the-board increase, if they would agree to return to work. The employees, after leaving the room and discussing the matter among themselves, came back in, rejected the offer of Respondent and walked out. As they were walking out, one of the employees said, "now we'll go Union."[18]

Outside on the picket line, Arnita was present. The employees told Arnita the results of the meeting and Arnita asked the employees what they wanted to do as far as continuing the strike or accepting the offer. All the employees present urged continuation of the strike. Thus for the first time, picket signs reading Local 445 IBT were distributed to the employees.[19]

That afternoon a telegram was received by Respondent from the Union. The telegram stated that the Union represented a majority of Respondent's employees in a unit of its production and maintenance employees, and requested a meeting to evidence the majority status and to commence negotiations. Respondent did not respond to this telegram.

On June 8, the Union filed a representation petition, seeking to represent Respondent's employees, in Case 2-RC-18391.

The charge in the instant case was filed on June 28 and the complaint issued on August 7.

B. *Distribution of Thanksgiving Turkeys*

In November 1979, Respondent for the first time in its history provided free turkeys to all of its employees on Thanksgiving. There is no evidence in the record that any mention of the Union was made at the time that the turkeys were distributed.

Bertha, who was hired as plant manager in January, testified that the giving out of such turkeys has been a longstanding practice of his at other plants. He further testified that, during the month of October, Respondent's sales had increased by 40 percent. Thus since October was such a great month, he testified that he felt that the employees should share in this and that he therefore decided upon the distribution of turkeys on Thanksgiving.

C. *The Wage Increases*

At the hearing the General Counsel amended the complaint to allege that Respondent on or about June 7, and at various times thereafter, bypassed Local 445 and dealt directly with employees by unilaterally promising and granting wage increases. During the course of the hearing, extensive testimony was taken as well as documentary evidence received, with respect to the granting of various wage increases to employees from June through October. The General Counsel appeared throughout the hearing to be arguing, as he was with respect to the turkeys, that the wage increases were granted, in part, in order to undermine the Union's majority status.

The General Counsel also indicated at the hearing that he would, after the hearing closed, inspect the records and testimony of Respondent and possibly withdraw this allegation of the complaint.[20]

However, the General Counsel has made no reference in his brief to the allegation of the grant of wage increases, either by way of withdrawing same or in urging a violation be found with respect to such conduct.

[16] The above description of this incident is derived from a synthesis of the testimony of Phillips, Johnson, Rehnberg, King, Keith Lund (an employee who testified that he was present), and Stew Meisner, a former employee of Respondent, who is employed at Hill Manufacturing located nearby, who was also a witness to the event. I credit the essentially mutually corroborative testimony of Rehnberg, Phillips, Johnson, and Meisner that the van did in fact strike the picketing employees. King, although testifying that he did not believe that the van struck any employees, admitted that he heard a metallic crash from the right rear of the van, which accounted for his decision to stop. Lund's testimony in support of King's is not credited. He was so anxious to corroborate King's version that he testified that King had turned on his directional signal and had come to a complete stop as he turned into the driveway. Even King himself admitted that he could not recall either using his signal or coming to a complete stop.

[17] Based on the testimony of Hayes, whom I found to be a forthright, candid, and truthful witness, corroborated in part by Embler and Joe Arnita, who was also present during part of the conversation. Although Embler did not corroborate Hayes and Arnita, insofar as they testified that Warren mentioned that he had heard from someone "inside" about the plant closing rather than accepting the Union, Hayes and Arnita's testimony in this area is supported by Bertha having stated to Schueler at the time of the demand that before King would negotiate with a union, he would rather close the doors and go out of business. Warran admitted volunteering the statement to employees that he felt that Respondent could not afford the demands of the Union, and "that either it would come down to either that they close the plant or move it." He claims, however, that this remark was precipitated by Olsen's informing him of the demands that the Union would be making upon the Employer of a $1.50- to $2-per-hour wage increase. I discredit Warran as to this testimony, as it appears from the credited testimony of the other participants to the conversation that Olsen was not even present. Additionally, I found Warran generally to be a confused and uncertain witness.

[18] No mention was made during the meeting of the Union by any of Respondent's officials or any of the employees.

[19] Previously the employees had used handmade picket signs without any reference to Local 445 or any Union appearing on said signs.

[20] See fn. 2, wherein I deleted certain individuals from the complaint pursuant to the General Counsel's concession in his brief.

Although I suspect that the absence of any reference to the allegation in the General Counsel's or Respondent's brief indicates a desire on the part of the General Counsel to withdraw such allegation, in the absence of an affirmative statement by the General Counsel to this effect I shall consider this allegation on the merits.

The evidence presented by Respondent, through testimony and documentary evidence, established that the raises granted to the employees of Respondent from June through October were consistent with and pursuant to Respondent's policy of periodic evaluations and merit increases, established by Bertha in February, shortly after he took over as plant manager.[21]

No evidence was presented that the grant of any of these wage increases was accompanied by any reference to the Union or the existence of a union campaign.

D. *Denial of Wage Increase to Larry Embler*

Embler was one of the employees who participated actively in the strike and the picketing. He returned to work after the strike ended on July 9. He returned at a salary of $3.90 per hour, the same salary that he was receiving prior to the strike.

Embler testified that in September and October he had a number of conversations with Terry Taylor pertaining to Embler's receiving a wage increase. Embler explained that he thought it was unfair that he was not receiving a wage increase. Embler felt that it was unfair that certain employees, with less seniority than he, particularly John Godfrey, Ed Wadja, and Keith Lund, had received increases and were making more money than he. According to Embler, Taylor at some or all of these discussions, told Embler that once he (Embler) was able to establish that he was trustworthy he would receive a raise. Embler admitted that Taylor did not explain what he meant by trustworthy.

Embler testified further, after a leading question by General Counsel, that Taylor had also said to him during one of these discussions that he had hurt his reputation by going out on strike.

Taylor on the other hand recalls the conversations with Embler about a raise, but states that he gave Embler various reasons why a wage increase had not been granted to him. These reasons included the fact that his regular anniversary evaluation was not due until January 1980, and that his work performance did not justify a merit increase prior to that time. Taylor gave Embler some areas where he could improve, such as coming in on time, agreeing to work more overtime, and putting out more work, in order to justify a merit increase.

John Godfrey hurt his back in late September, and was out of work, which left Embler as the only employee performing work on the long oven. Embler, according to Taylor, after Godfrey left, began to come on time, and perform exceptionally in his work. Accordingly, in late October, Taylor recommended that Embler receive a wage increase of 20 cents per hour, which he received as of October 28, 1979. Embler also received his annual evaluation in January 1980 and received a 30-cent-per-hour increase.

Embler began working for Respondent in January 1978. He was making $3.35 per hour in January 1979, and received raises on February 11 and 25, to $3.90 per hour.[22]

The General Counsel submits that Embler was discriminatorily denied a wage increase in view of the fact that employees who did not go on strike received increases prior to the time that Embler received his increase. He also notes that these employees were making more money than Embler, although they began working after Embler. The General Counsel did not mention in his brief which employees he was referring to, but Embler in his testimony mentioned Godfrey, Lund, and Wajda.

The record revealed that Godfrey began working for Respondent on August 22, 1978. He received a number of raises from that time through April 22, 1979, and at the time of the strike was making $3.95 per hour. In fact, the record also establishes that, prior to the strike in April, Embler complained to Taylor that it was not fair that Godfrey and he were getting the same amount of pay because Embler had more seniority. Taylor replied that, since he and Godfrey were doing the same work, and the new evaluation system was being instituted, it was fairer to keep them at the same rate and, when the regular evaluation periods came up, seniority would be considered.

Godfrey did work during the strike and received a raise on August 12 of 25 cents per hour to $4.20. Embler again in August complained to Taylor about Godfrey receiving a raise, when he had to wait until January. Taylor responded that this was Godfrey's annual review (his starting date was August 1978), but Embler could catch up when his annual review occurred in January 1980.

On September 9, Godfrey received another increase of 25 cents per hour to $4.45 per hour, but this was due to his promotion to the position of group leader.

As for Lund, he began working for Respondent on August 15, 1978. Prior to the strike he was making $4.20 per hour, in part because of his responsibilities as a group leader. He also worked during the strike and received a raise of 60 cents per hour to $4.80 on August 19, 1979. Taylor testified that Lund was evaluated as part of his annual review at that time and it was decided that in view of his outstanding work including working a shift no one else liked, as well as the fact that he was given additional responsibilities with respect to shipping, that a 60-cent-per-hour increase was warranted.

Wajda began working for Respondent on November 30, 1978, and at the time of the strike was making $3.55 per hour. He worked during the strike, and received raises on July 8 and August 19, of 25 cents each, bringing him to $4.05 per hour. Taylor explained that the July raise was due to the fact that Wajda was doing Kevin Fitzpatrick's work during the strike, which justified in Taylor's judgment a merit raise of 25 cents.

[21] This policy calls for evaluations after 6 weeks, 3 months, and thereafter on an employee's anniversary date.

[22] The increase on February 25 was part of a general across-the-board increase for all employees.

After the strike ended, Wajda was promoted to a group leader on the night shift and received a 25-cent-per-hour increase on August 19. It is noted that at or around the same time, Tom Dolan, one of the active strikers and picketers, returned to work after the strike, and also received a 25-cent-per-hour raise due to his promotion to group leader.

In addition, the record reveals that a number of other employees who were on strike and were card signers for the Union, who returned to work after the strike, received wage increases prior to Embler receiving his increases. These included David Ibbotson, Terry Drouin, James Fichera, Charles Shapiro, and Kevin Fitzpatrick.

F. *Acts of Violence by Pickets*

Respondent presented a number of witnesses who testified to various acts of violence allegedly committed by pickets throughout the course of the strike. Respondent contends that the Union was responsible for the conduct of the pickets, and these acts of violence are sufficient to taint or invalidate a number of the authorization cards obtained by the Union, and to disqualify the Union from receiving a bargaining order.[23]

Much of the violence, as set forth below, was committed by Steven Olsen, one of the pickets. Respondent seeks to attribute responsibility to the Union for Olsen's conduct, based on Olsen's alleged leadership role among the employees and on the picket line. It is undisputed that Olsen was the chief spokesman for the employees in all their meetings with Respondent, and informed Respondent that, unless their demands were met, the employees were not going to work. Although some evidence was adduced that Olsen directed some employees on the picket line where to stand, other employees also made such directions. While there is some evidence that Olsen attempted to schedule some employees for picket line duty, other employees were more heavily involved in such activity, more particularly, Mark Hayes, who received a list of names and phone numbers of card signers from Arnita in order to contact pickets for this purpose.

Arnita himself was present everyday of the strike for varying periods of time. He appointed no picket captain, nor anyone else to be in charge of the line when he was away. The Union supplied picket signs to the employees on and after June 7. Arnita gave instructions to the pickets not to engage in threats or violent acts.

As for the acts of violence themselves, Olsen was not called to testify. Thus the acts attributable to him stand largely unrebutted, and I find them therefore to have taken place as testified to by the witnesses called by Respondent.

Jack King testified that on Saturday, June 9, as employees were attempting to come to work, he saw Olsen with a rock in his hand making threatening gestures to these employees. In addition, Olsen shouted to one employee, "you may get in, but you will not get out again." The record does not establish whether Arnita was present when these events occurred.

John Godfrey testified that on June 5, as he was leaving the plant, a number of pickets including Olsen yelled that they were going to make it so he could not work again. They added that they were going to get his wife and going to wreck his car.

On Friday, June 8, as Godfrey was driving into work, Olsen yelled that he should not cross the picket line, and added "if you do we're taking you out in a wooden box."

On Monday, June 11, as Godfrey was walking into the plant with employee George Heim, Olsen said to them that he was going to cut their throats and that he had the knife right there to do it. He added that it did not matter to him, because he was already facing criminal charges. At the time that Olsen made this remark, he was wearing a large bowie knife. Olsen repeated this remark to Godfrey and Heim on several other occasions throughout the strike.

On another occasion, in the second week of the strike, as Godfrey was driving into the plant, Olsen threw a rock and hit the windshield of Godfrey's car and yelled at Godfrey that he was going to get him and Godfrey was going to be leaving in a wooden box.

On various other days during the strike, Olsen, as well as other pickets, attempted to block Godfrey as he and Heim were coming into work or leaving. Due to this activity it was necessary to call the police on many occasions in order to enable them to enter or leave the premises.

Godfrey does not recall seeing, nor does other evidence establish, that Arnita or any union officials were present during any of the above-described incidents.

Godfrey also testified that on Thursday of the second week of the strike, June 14, on the picket line, Mike Phillips said to him and George Heim that he (Phillips) had a gun and was going to shoot Heim and Godfrey, and made a gesture by pointing his finger in the form of a gun at his head. Phillips denied this incident and denied ever making such a threat to Godfrey or Heim. Heim testified, and although corroborating Godfrey with respect to his testimony concerning Olsen, did not mention the incident involving Phillips, nor did he testify about any incident involving a threat to shoot any employee by any of the pickets. In view of Heim's failure to corroborate Godfrey, Phillips' denials, as well as my previous finding that Phillips was in the hospital on June 14, and therefore could not have been present at the picket line on that date, I discredit Godfrey with respect to his testimony concerning Phillips' alleged threat to shoot him and Heim, and find the record insufficient to establish that such an incident occurred.

Godfrey, Heim, and Taylor testified concerning an incident which occurred on or about June 21 or 22. Their testimony essentially mutually corroborative, which I credit, establishes that Al Guinta, who had been on the picket line with the striking employees for a short time, then decided to come to work. Since he was afraid to be seen by the pickets he would sneak into work through the back entrance near the woods, where there was no picketing. Finally, on June 21 or 22, at lunch time, Guinta walked outside the plant near the parking lot and was observed by the pickets. Olsen approached him and asked why he was not for the Union and now working

[23] *Laura Modes Company*, 144 NLRB 1592 (1963).

again. Olsen added that a strike cannot work if people who walked out started to work the next day. Guinta apparently made no reply. Olsen said that he would get Guinta, and added that he knew where Guinta lived and where his girl friend lived, and that if he (Olsen) did not get him at work he would get him at home or his girl friend's home. Olsen then shoved Guinta in the chest with both hands. Guinta did not fall down, but was driven backwards 4 or 5 feet. Olsen then returned to the picket line.

Arnita was present on the picket line during this incident. Arnita, after the incident ended, went over to Olsen and reprimanded him about his conduct in the presence of a number of other picketing employees. Olsen told Arnita that he got mad and could not control himself. Arnita replied that he had told Olsen before and did not want to have to tell him again, "We don't want no violence on the line at all. In the future, control yourself." Olsen responded that he was sorry and he would see that it did not happen again.

George Heim, in addition to corroborating in part the testimony of Godfrey and or Taylor as set forth above, testified further about other statements made to him by Olsen. During the second week of the strike, Olsen told Heim that it would just take $150 for him to pay someone to break Heim's legs.

Ed Wajda testified that as he was leaving the plant in his car on June 6 at 9 a.m., Olsen and Phillips yelled at him, "we're going to get you," "we're going to kick your ass." As he was going into the plant through the woods later in the day on June 6, he was approached by Embler and Johnson, and Embler told him that he better not go in or they were going to "kick his ass." Embler added that if he went in he would not get out.

On Monday, June 11, Wajda was riding into work along with employee Sherry Wheeler, in Wheeler's car. Olsen picked up a rock, threw it, and hit the back of the car. As he and Wheeler were driving out of work on June 11, they slowed down at the edge of the driveway. Olsen came to the window and said, "I'm going to kick your ass. Get out of the car right now." Wheeler drove away.

Sometime early in the strike, Phillips, in the presence of Lund, came up to Wajda with his fist clenched and said, "I'm going to kick your ass right now." Wajda replied, "What do you want to fight me for?" Lund then stepped in and told Wajda to get out of there, which he did.

Sometime during the third or fourth week of the strike, Olsen again threatened to get Wajda and to beat his "ass." Later that same day, Wajda went out to the picket line to speak to Olsen. Wajda began by saying, "I want to talk to you." Olsen then spit in Wajda's face and slugged him in the chest. Wajda then turned around, walked away, and proceeded to file criminal charges against Olsen for assault.

The next day Olsen approached Wajda and told him that he better not press charges or "that's the last thing you're ever going to do."

According to Wajda, although he knew who the union representative was, he could not recall him being present during any of the incidents described in his testimony, except for one occasion. On this occasion, a picket whose name Wajda could not recall threatened to kick his "ass." The union representative according to Wajda was standing 10 feet away from the picket who made the threat, and Wajda believed that the union representative must have heard the remark.

Bertha testified that several times during the strike Olsen and other pickets threatened to burn his house down, told him that they knew where he lived, and that they had done it before, and they knew how to do it so that nobody could get out.

At approximately 7:30 a.m., on June 6, Schiavone, who had worked on June 5, was driving his car out of the plant. Employees Lund, Wajda, Donna Jaeger, and Supervisor Taylor testified that they observed Phillips and Olsen approach the car. Schiavone stopped, and Phillips and Schiavone began to yell at each other. These witnesses did not hear what was said. Phillips admits that there was yelling, and that he called Schiavone a "scab faggot and an asshole."

Jaeger, Taylor, Lund, and Wajda concur that Phillips during the discussion reached his hand in through the window of the car and attempted to punch Schiavone. The punch missed as Schiavone ducked.

Phillips denies attempting to punch Schiavone during this incident. In view of the corroboration of four witnesses,[24] I find that Phillips did in fact attempt to punch Schiavone on the morning of June 6.

Taylor testified further that he saw Olsen throw a crate under Schiavone's car as he attempted to drive away and that Schiavone was forced to stop his car, get out, and remove the crate before he could drive away. Neither Jaeger, Lund, or Wajda corroborated Taylor with respect to this allegation, and as noted neither Schiavone nor Olsen testified. Phillips recalled seeing Schiavone's car hit a crate, but does not recall seeing Olsen throw it. Although Taylor was not corroborated by the three other witnesses on this issue, in the absence of a denial from Olsen, I shall credit Taylor and find that Olsen did in fact throw the crate underneath Schiavone's car as he was leaving.

Phillips testified further that, when he spoke with Schiavone and called him names as set forth above, Schiavone asked what he was talking about. Phillips responded that he (Schiavone) knew that the men were on strike, and asked him if he "was with us or not?" Schiavone replied that he did not know. In the absence of any contrary testimony, I credit Phillips as to this conversation with Schiavone. Later on that day, Schiavone came back, joined the employees on the picket line, and signed an authorization card for the Union. The card was handed to him by Fitzpatrick, in the presence of Phillips and Olsen.

Respondent also presented evidence of the occurrence of damage to Respondent's property, although no witnesses were presented to the actual causation of such damage. Respondent argues that the record contains sufficient circumstantial evidence to attribute this damage to the pickets and the Union.

[24] Schiavone was not called to testify.

On June 8, Bertha testified that he observed in the plant fire extinguishers set off, powder all over the place, cartons and boxes pushed over, and wires ripped out. Bertha testified that there was a security guard present during the night before, and that the security guard informed him that the pickets were on the line all evening and were drinking. Bertha also testified that there were no break-ins at the plant before or after the strike.

Bertha also testified that the windshield on his car and that of an employee were broken. Bertha testified then on June 15, when he parked his car in the driveway at 1 p.m., after returning from lunch, there was no damage. When he left at 5 a.m., he observed three small holes in his windshield.[25]

Bertha also testified that on this day, as well as many others, he observed employees on the picket line with a slingshot, shooting stones with it. Bertha did not see an employee shooting stones with a slingshot at his or at any other car or person.

Various picketing employees admitted the presence of a slingshot on the line, but testified that it was only used by employees to shoot stones into the woods.

Finally, Bertha testified that Donna Jaeger informed him on June 15 that she had received an anonymous call from someone who said that they owned a store and that some employees of Respondent had said among themselves that they had placed a board with nails under a truck tire. Bertha then went outside and observed a board with nails sticking out of it under each of the tires of a truck near Respondent's loading dock.

G. *Majority Status of the Union*

The parties stipulated that the following employees were included in the bargaining unit as of the week of the strike, which includes June 5 through June 7; Miller, Embler, Godfrey, Ibbotson, Fredell, Seeley, Wajda, Drouin, Fichera, Olsen, Hayes, Wheeler, Schiavone, Phillips, Bender, Guinta, Johnson, Decker, Shapiro, and Koehler.[26]

The bargaining unit status of six individuals, Fitzpatrick, Lund, Dolan, Heim, Rehnberg, and Madia, are in issue.

George Heim and Keith Lund were group leaders on the second and third shifts respectively. Each had three or four employees under them and no higher supervisor was present during these shifts. The work to be done would be left by Respondent's admitted supervisors, Taylor and Warran, and Heim and Lund would distribute the work to the employees. The record does not establish what independent judgment, if any, is exercised in the assignment of work by Lund or Heim.

They had no authority to hire or fire or to recommend hire or fire, but they did have the authority to send employees home for misconduct or not following orders. The instructions were, however, to attempt to contact either Taylor or Warran at home first, and if they could not be reached, then the group leader could send the employee home. The next day, the group leader would report the incident to Taylor or Warran, who would then take appropriate action. Neither Heim nor Lund ever exercised this power, insofar as the record discloses. On one occasion, Lund reported employee Shapiro to Warran for "horsing around," and, as a result of this report, Warran suspended Shapiro. However, Lund made no recommendation to Warran as to what action if any to take against Shapiro.

With respect to Heim the record establishes that he was suspended on June 1, for a week without pay, and informed of his removal as group leader. On that day, Bertha asked Dolan if he were interested in assuming the group leader position, Dolan agreed to do so, and it was agreed that Dolan would be trained during the week of June 4, and would start as group leader on June 11. However, as noted, the strike intervened, so Dolan did not take over as group leader. Heim reported to work on June 9 but did not work. On June 11 he worked, at his same salary of $4.75 per hour.[27] During the strike, only one shift was utilized, so Heim did not exercise any group leader responsibilities during the strike. Heim became a group leader again in the fall of 1979 as part of a reorganization when Steve Warran left the Company. Dolan became a group leader sometime after he returned to work after the strike.

Kevin Fitzpatrick was a "lead man" in the belling department. There were three employees in the belling department to whom Fitzpatrick assigned work. The record does not establish whether or not Fitzpatrick exercised independent judgment in his assignment of work to other employees. Fitzpatrick spent the majority of his time performing production work along with the other employees. Fitzpatrick was consulted by Taylor in connection with retention of a probationary employee. In addition, Taylor would also utilize Fitzpatrick's performance appraisals in connection with the periodic evaluations, when deciding upon wage increases. However, the record does not establish whether Fitzpatrick ever made any specific recommendations to Taylor or other management officials on the subject of whether to retain an employee or whether or how much of a wage increase to grant to an employee.

Rehnberg was employed in the shipping department, and was responsible for getting out orders and taking care of paper work. He also, as did Fitzpatrick, discussed the performance of employees with Taylor in connection with retention, merit reviews, and evaluations, but, insofar as the record reveals, did not make any recommendations to Respondent in any of these areas.

Rehnberg in addition at the end of May had given notice to Respondent that he was leaving to take another job, effective as of June 8, 1979. As noted, the strike occurred on June 5, and Rehnberg was on the picket line from June 5 to June 8. Respondent sent him the June 7 and July 3 reinstatement letters described above, and he did not respond to either letter.

Anthony Madia worked for Respondent on June 5 until 12 noon. Taylor testified that Madia told him that he was quitting. Taylor was not sure whether Madia told

[25] Bertha also observed the next week the windshield of employee Richie Mahan with similar small holes in it.

[26] The parties also stipulated that employee Brian Nolan was a casual summer employee and not includable in the unit.

[27] Group leaders received a 25-cent differential.

him this on June 5 before he left at 12 noon or whether he called the next day to inform him of his quitting.

Bertha testified that he was informed by a secretary in the office that Madia had called on Wednesday, June 6, and resigned.

As noted, the Union obtained 12 authorization cards on June 5; 4 on June 6; and 1 on June 7. Nine of these cards were directly authenticated by the signers, and the remaining eight by employees and or Arnita who testified that the cards were signed in a group on the picket line and returned immediately to them by the signers. Respondent asserts that the cards of the eight card signers who were not called to testify, Schiavone, Guinta, Fichera, Banker, Shapiro, Drouin, Koehler, and Nolan, should be invalidated because of the extensive violence on the picket line, as set forth above.

However, with the exception of the incident involving Schiavone's altercation with Phillips and Olsen when he attempted to leave the plant on the morning of June 6, no evidence was adduced that any of these employees were subjected to or were ever even present during the commission of any violence or threats prior to their signing cards.

Respondent points to Taylor's testimony that he was told by Fichera and Guinta that pickets had threatened to beat them up or damage their vehicles if they tried to report to work. Aside from this testimony being clearly hearsay, there is no indication in Taylor's testimony as to when his conversations with these employees were or when these threats were made to them or whether the alleged threats were made before or after they signed cards. Respondent also points out that Guinta was physically assaulted by Olsen, one of the pickets. However, it is noted that this assault took place some 15-16 days after Guinta signed his card.

Concluding Findings

A. *The Alleged Discharges*

The Board has recognized that it is sometimes difficult to determine whether an employer, by its remarks, has discharged strikers, or has simply attempted to intimidate them in an effort to deter them from striking.[28] Each case requires a careful examination of the facts.

In the instant case Respondent, by Bertha on June 5, told the second-shift employees, Guinta, Drouin, Banker, and Shapiro, that if they did not return to work he would assume that they had quit. The employees did not return to work, and, later that evening, Respondent's officials removed their timecards, and concluded that, since these men did not report to work as ordered, Respondent would assume they had quit. Taylor admitted that his intention on June 6 was not to permit these employees, if they reported to work, to enter the premises. However, none of them attempted to report to work on June 6, and Respondent at no time ever informed these four employees that Respondent had decided to terminate them or that it had in fact assumed that they had quit. All four of these employees were reinstated when they so requested, on various dates between June 18 to July 9.

The General Counsel contends that the employees were constructively discharged by Bertha's remarks, in that continued employment was made conditional upon employee abandonment of rights guaranteed under the Act, i.e., their right to strike.

The General Counsel cites *Masdon Industries, Inc.*, 212 NLRB 505 (1974), as authority for his position. However, although *Masdon* does recognize that a constructive discharge can be found where continued employment has been conditioned upon abandoning rights guaranteed under the Act, no violation was found to exist on the facts of that case. The cases cited in *Masdon* where such a violation has been found were situations where continued employment was conditioned upon giving up union membership,[29] an illegal condition of employment has been imposed,[30] or working conditions have been changed in a manner which has the effect of forcing employees to quit because the employee engaged in union or protected concerted activity.[31]

None of these factors is present in the instant situation, and the issue of whether these employees were discharged is in my judgment controlled by the principles set forth in *Kerrigan Iron Works, Inc.*, 108 NLRB 933 (1954), affd. 219 F.2d 874 (6th Cir. 1955). In *Kerrigan* although the employer had threatened to terminate employees if they did not return to work by a certain date, and had in fact treated the employees as having been terminated, no discharges were found, since the employer's subsequent conduct was inconsistent with a view of discharge. The subsequent conduct considered most crucial in *Kerrigan*, and many subsequent cases following *Kerrigan*,[32] is whether or not the employer reinstates those employees who requested same, after the employer's alleged discharge statements. Where an employer does reinstate all those who apply, the Board finds, as it did in *Crookston* and the other cases cited in footnote 32, that the statement of the employer was merely a tactical maneuver and an attempt to dissuade employees from persisting in their strike conduct.

Crookston explained that a violation would be found where an employer by subsequent conduct or language reiterates that original conduct. In the instant case Respondent's subsequent conduct consisted of notifying these four employees the next day that their jobs were available as well as taking all four of them back to work when they applied. Most significantly, at no time were these four employees ever notified by Respondent that a decision had been made to terminate them.[33] According-

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[28] *C & W Mining Co., Inc., and/or C & W Hauling Co., Inc.*, 248 NLRB 270 (1980), and cases cited therein.

[29] *John E. Holkko, d/b/a Lifetime Shingle Company*, 203 NLRB 688 (1973); *American Enterprises, Inc.*, 191 NLRB 866 (1971).

[30] *Orr Iron, Inc.*, 207 NLRB 863 (1973); *Block-Southland Sportswear, Inc., and Southland Mfg. Company, Inc.*, 170 NLRB 936 (1968).

[31] *United Service Corporation d/b/a Forest Park Ambulance Service*, 206 NLRB 550 (1973); *Dumas Brothers Manufacturing Company, Inc.*, 205 NLRB 919 (1973).

[32] *Floyd Fuel Co.*, 126 NLRB 458 (1960); *Crookston Times Printing Company*, 125 NLRB 304 (1959); *Matlock Truck Body & Trailer Corp.*, 217 NLRB 346 (1975).

[33] *Woodlawn Hospital v. N.L.R.B.*, 101 LRRM 2300 (7th Cir. 1979); *Methodist Hospital of Kentucky*, 227 NLRB 1392 (1977).

ly, I find that Respondent's actions with respect to these four employees do not rise to the level of a discharge, and I shall recommend dismissal of this allegation of the complaint with respect to employees Guinta, Drouin, Shapiro, and Banker. However, since the statements of Bertha made to these employees as well as similar remarks made to the first-shift employees are clearly threats to terminate them in reprisal for their engaging in protected activity, they constitute infringement upon the employees' rights to engage in such activity, in violation of Section 8(a)(1) of the Act, and I so find. *Kerrigan, supra; Matlock, supra.*

With respect to the first-shift employees, Respondent concedes and I agree that those employees whom Respondent notified on either June 5 or 6 of their discharges were in fact discharged by Respondent. Respondent concedes that Fitzpatrick, Olsen, Rehnberg, Embler, Phillips, Dolan, Johnson, and Hayes were included in this group. As noted, I have found above that Fichera was also present on June 6, when Taylor refused to permit employees to enter the plant and informed them of their termination. Therefore, I find that he was terminated as well.

That leaves for consideration the status of first-shift employees Koehler and Nolan. They were present on the picket line on June 5 when Bertha told the first-shift employees that, if they did not report for work the next day, Respondent would assume that they had quit.

Respondent decided to terminate them on June 5, along with the other first-shift employees, and Taylor admits as he did with respect to the first-shift employees that, if Koehler or Nolan had attempted to report for work on June 6, he would not have permitted them to do so. However, neither Koehler nor Nolan was present on the morning of June 6 when Taylor notified the other strikers of their discharge. In addition, the record does not establish whether Nolan or Koehler was ever notified of Respondent's actions by Respondent or by other employees.[34]

Koehler and Nolan were both informed orally by Respondent that their jobs were available on June 6, and by letter on June 7, but insofar as the record discloses did not make any attempt to return to work for Respondent.

In these circumstances since there is no evidence that either Koehler or Nolan was ever informed by Respondent or became aware of Respondent's decision to terminate them, plus the fact that they were told that their jobs were available on June 6 and 7, I find that their status is similar to that of the second-shift employees and that under *Kerrigan*, and *Crookston*, were not discharged by Respondent.

Although an argument can be made that the rationale of *Arsham, supra*, could be applied herein, i.e., that Respondent reasonably could have expected that Taylor's statements of termination to the strikers would be communicated to the two absent strikers, I note that in *Arsham* the Board also noted that in fact these statements were communicated to the absent strikers, which they were not in the present case. Thus, since the only communication to Koehler and Nolan on June 6 was that their jobs were available, I find *Arsham* to be distinguishable and that the discharge of Koehler or Nolan has not been established by a preponderance of the evidence.[35]

Turning to the legality of the discharges of the nine strikers whom Taylor notified of Respondent's action on June 5 and 6 and refused to allow into the plant on June 6, it is well settled that an employer violates Section 8(a)(1) of the Act when it discharges employees for engaging in strike activity.[36] Respondent seeks to defend its actions by asserting that "Bertha made the decision in good faith and upon the advice of counsel to terminate these employees because they had prevented trucks from entering the Company's premises in violation of Section 8(b)(1)(A) of the Act." However, contrary to Respondent's contention, the evidence of record with respect to this issue reveals that the "preventing" of trucks from entering consisted merely of evidence that truckdrivers honored requests made of strikers to honor their picket line. It is obvious that the "interference with Company business" referred to by Bertha and Taylor was caused by strikers engaging in legitimate picket line activity of making such requests. No evidence of substantial physical blocking or threats or other unlawful conduct having been engaged in by strikers prior to their discharge was adduced by Respondent. As to the alleged unprotected activity, Respondent must present particularized proof that each discriminatee was personally guilty of serious misconduct before the individual in question loses the protection of the Act.[37] This, Respondent has clearly not come close to demonstrating on this record. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act by discharging the nine first-shift employees on June 5.

The complaint alleges that the discharges were also violative of Section 8(a)(3) of the Act in that they were also motivated by the employees' activities and support of the Union. Although the strike began as an economic strike solely by the employees, the Union was called in and the employees signed authorization cards shortly after the strike began. The Union made a demand for recognition, and at that time Bertha informed the union president that these employees did not work there anymore as they had quit, and added that King would rather close the doors before negotiating with the Union. An hour later, Respondent's officials met and decided to terminate the strikers "allegedly" for blocking trucks and interfering with company business. Clearly Respondent was aware of the union activities of those discharged, as they were all card signers and were all on the picket line. In these circumstances, I find that, in addition to discharging the employees for strike activities, the discharges were also in part linked to their union activities in violation of Section 8(a)(3) of the Act.[38]

Respondent, while conceding that these employees were discharged, makes the curious statement in its brief that "the propriety of these discharges, however, is not

[34] Cf. *Martin Arsham Sewing Co.*, 244 NLRB 918 (1979).

[35] *Woodlawn Hospital, supra; Methodist Hospital, supra.*

[36] *Cincinnati Cordage and Paper Co.*, 141 NLRB 72 (1963); *Hilltop Van and Storage Company*, 182 NLRB 1004 (1970).

[37] *Fry Foods, Inc.*, 241 NLRB 76 (1979).

[38] *Hilltop Van & Storage Co., supra.*

in issue. Less than 24 hours after deciding to terminate these employees, the Company, in an effort to end the strike, offered each of them reinstatement, and as each individual expressed a desire to work he was immediately reinstated." Respondent cites *Maxville Stone Company*, 166 NLRB 888 (1976), as authority for the above comments. In *Maxville* the Administrative Law Judge on facts somewhat similar but different in significant respects to those herein,[39] found that under the rationale of *Kerrigan* and *Crookston, supra*, the respondent's letter to employees whom it had fired earlier, notifying them to report for work, vitiated the earlier discharge action, and found that no discharge had actually occurred. I would note that *Maxville*, although a Board decision was an affirmance of an Administrative Law Judge's Decision, where no exceptions were filed by the General Counsel or the charging party. Therefore, its precedential value on this issue is somewhat doubtful, particularly where it seems to conflict with later Board precedent such as *C & W Mining, supra*. In *C & W Mining*, the Board reversed an Administative Law Judge's Decision which found that an employer under the rationale of *Kerrigan* had not discharged employees, but merely engaged in a tactical maneuver to pressure employees to abandon the strike. The Board found, emphasizing facts similar to those present herein, that the respondent left no doubt that it was discharging the strikers, not only by making an unconditional statement that he was firing them, but also by ordering them off the premises because they no longer worked there. The Board also pointed out that the fact that the strikers terminated the strike and returned to work "does not alter the indisputable fact that they were discharged while still on strike." I therefore reaffirm my finding that the nine strikers here were effectively discharged by Respondent on June 5.[40]

A more significant issue, however, is presented by Respondent's efforts to offer the discharged strikers their jobs back. That is whether Respondent's offers of reinstatement on June 6 and 7 constitute valid offers of reinstatement, sufficient to toll backpay liability.

The Board has long held that a discriminatee on receiving an offer of reinstatement has a "fundamental right to a reasonable time to consider whether to return."[41]

There is no *per se* rule as to the period of time that will constitute reasonable notice to the discriminatee. Rather, the Board examines the factual circumstances of each case to determine what constitutes reasonable time. *Murray Products, Inc.*, 228 NLRB 268 (1977).

The Board has held further that it will look to see "if the terms in which the offer is couched fail to provide any reasonable time within which the employee can act."[42]

A significant factor to be evaluated in determining the amount of notice to be required is the acts of discrimination and their effect on the discriminatees. *Murray Products, supra.*

The General Counsel argues that the discriminatees herein were not afforded a reasonable time to consider Respondent's offers. I agree.

Although as Respondent points out neither the oral nor written offers required acceptance by a certain date, I find that, under all the circumstances herein, the offers comtemplated an immediate return to work.

The facts in *Murray Products* closely parallel the situation here, and the Board's language is particularly appropriate and pertinent to the instant case:

> Here, the strikers on August 4 were unlawfully denied reinstatement. The Respondent, with a classic lack of candor and demonstrating its opposition to protected concerted activities, informed the discriminatees that they had been permanently replaced. Two days later and with 10 vacancies, the Respondent commenced a series of oral offers of reinstatement, all of which contemplated an immediate return to work. The fact that most of the strikers were on the picket line and apparently physically able to return to work does not justify finding the offers of reinstatement to be valid. The Respondent's unlawful acts and its untruthful statements about vacancies created a situation which warranted allowing the discriminatees a reasonable time for serious evaluation of the offers of reinstatement. The strikers here were permitted absolutely no opportunity to evaluate their status and the Union's status in light of their having been previously informed that they had all been permanently replaced. [*Id.* at 269.]

I find that the offers herein did contemplate immediate acceptance on the part of the employees. The June 7 letter notified the employees that their jobs were "at this time available," and further advised them that "effective immediately, we will begin to hire permanent replacements to fill the plant requirements." These statements clearly contemplate an immediate decision to be made by the employees, or else they will be "immediately" replaced. I would note that Respondent as of this time had no legal right to replace the discharged strikers, since their status had changed from that of economic strikers to discriminatees by virtue of Respondent's unlawful act of discharging them. Thus, as in *Murray Products*, Respondent's unlawful acts and untruthful statements created a situation which warranted allowing the discriminatees a reasonable time for serious evaluation of the offers, and an opportunity to evaluate their status and the Union's status, in light of having previously been informed that they had been terminated.

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[39] The employees in *Maxville* were informed that they were fired immediately after refusing to end the strike and report to work. Later that same day, the employees were given a letter instructing them to report to work the next day. In the instant case, the evidence established that the respondent, after threatening to discharge employees for striking, removed their timecards, made a management decision to terminate them, informed two employees the same day, and the next morning told the rest of the employees of the respondent's decision, while refusing to permit them to enter the plant.

[40] *C & W Mining, supra; Accurate Die & Manufacturing Corp.*, 242 NLRB 280 (1979).

[41] *Penco Enterprises, Inc., Penco of Ohio and Acoustical Contracting Supply Corp.*, 216 NLRB 734 (1975).

[42] *Fredeman's Calcasieu Locks Shipyard, Inc.*, 208 NLRB 838 (1974).

Accordingly, I find that the offers to the nine discriminatees were invalid,[43] and that all of the discriminatees are entitled to backpay from June 5 until the date of their reinstatement or when they received the valid offer of reinstatement in July. *Murray Products, supra; C & W Mining, supra.*[44]

B. *The Alleged Threat to Close the Plant*

As noted, I have found that Respondent's supervisor, Steve Warran, on June 6, told employees Embler and Hayes on the picket line, that he did not think that Respondent could afford to meet the demands of the Union, and that they would have to close or move, and adding that he had heard from someone inside the plant that the Company would rather close down and move than accept the Union. Respondent argues that the statements of Warran were demonstrable economic predictions of consequences which could result from the employees' concerted activity, protected by Section 8(c) of the Act.[45] I do not agree.

While an employer may lawfully predict the precise effects he believes the union will have on the company, the prediction must be carefully phrased on the basis of objective facts to convey an employer's belief as to the probable consequences of the union.[46]

Warran's prediction of plant closure and moving was not based on any objective facts here. The Union had not made any demands nor could Warran legitimately foresee what the results of any future negotiations might be. The advent of the Union would only have required Responded to bargain in good faith over wage demands, not that it had to grant increases. Therefore, Respondent's unfounded economic forecast of plant closure or moving if the Union obtained representational status was coercive in nature and violative of Section 8(a)(1) of the Act.[47]

C. *The Van Incident*

The Board has held that the lawfulness of the incidents such as King having struck pickets with his van, as I have found, is based not on the intent of King, but on whether the conduct reasonably tends to interfere with the exercise of employees' rights.[48] There can be little doubt that King in the instant case was the perpetrator of an assault rather than an escaping victim.[49]

The failure of King to stop the van, and the fact of his striking the employees with the van, evinces sufficient negligence and is sufficiently threatening to the employees struck, as well as to the onlookers, to constitute conduct reasonably tending to interfere with employee rights in violation of Section 8(a)(1) of the Act.[50]

D. *The Gun Incident*

The issue to be decided in connection with this incident is whether the evidence is sufficient to establish that King brandished his gun in view of the pickets, in response to protected concerted activity of said pickets and tended to interfere with the employees' lawful picket line conduct.[51]

King testified that he took the gun with him to protect himself, his employees, and his building, in view of various reports made to him of violent acts committed by pickets. Therefore, Respondent contends that King's actions were defensive in nature and not in response to the pickets protected concerted activity.[52]

However, the record does not establish in my judgment that King's actions were prompted by any alleged acts of violence committed by pickets. King admitted that, at the time that he went out to speak to the driver, no violence or damage to his property, or to the persons or property of his employees, had been committed by pickets. Although King testified that he received various reports of alleged threats to employees and that a truck-driver previously attempting to pick up was given a "hard time" by pickets, this hearsay testimony does not establish that any violence was committed by pickets prior to King bringing his gun out to the picket line. Absent evidence that pickets did in fact commit violence or damage, I must assume that Respondent had other reasons for taking such deliberate actions.[53]

The pickets were faced with a simple set of facts. They had not committed any violence or done any damage, and had merely exercised their lawful right to request that the driver honor their picket line. Immediately thereafter King appeared, brandishing a gun, and, in full view of the pickets, jumped on the running board to speak to the driver of the truck. Such conduct could only have the effect of inhibiting the pickets from engaging in their lawful right to conduct their picket line. Thus King's actions interfered with, restrained, and co-

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[43] Respondent also argues that all strikers who requested reinstatement were permitted to do so, including some of the discriminatees. I would note in this connection that none of the discriminatees requested reinstatement until after the July 3 letter of reinstatement, which letter the General Counsel concedes to have been a valid offer of reinstatement. Moreover, in *Murray Products, supra*, Respondent also reinstated all strikers who accepted its offer, a factor relied on by the dissent. However, the majority still found the offers to be invalid.

[44] When Bertha orally informed some of the strikers that their jobs were available, one of the strikers told Bertha that they would not return until their demands were met. This raises an inference that at least some of the strikers may have "continued to withhold their services as a matter of personal choice," *C & W Mining, supra*; or were influenced by "apparent tactical or common policy front considerations causing most to choose continuing picketing rather than abandoning the strike." *Murray Products*. However, as the Board in *C & W Mining* points out, "this is a matter for compliance, for as we noted recently in *Abilities and Goodwill Inc.*, 241 NLRB 27 (1979), even in the absence of an offer of reinstatement, the employer remains free to avoid or reduce its backpay obligation by establishing [at the compliance stage of the proceeding] that the [discharged striker] would not have accepted the offer if made . . . and instead continued to withhold their services as a matter of personal choice."

[45] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[46] *Marathon Le Tourneau Company, Gulf Marine Division of Marathon Manufacturing Company*, 208 NLRB 213 (1974); *Starkville Inc.; Hillsdale Manufacturing Corporation, et al.*, 219 NLRB 595 (1975).

[47] *Buckeye Tempo Gamble-Skogmo, Inc.*, 240 NLRB 723 (1979); *Patsy Bee, Inc.*, 249 NLRB 976 (1980); *Marathon, supra; Starkville, supra.*

[48] *May Cohen d/b/a Best Dress Company*, 245 NLRB 949 (1979).

[49] *Ibid.*

[50] *Dee Knitting Mills, Inc.*, 214 NLRB 1041 (1974); *Best Dress, supra.*

[51] *Church Point Wholesale Grocery Company, Inc.*, 215 NLRB 500 (1974).

[52] *Skrl Die Casting, Inc.*, 245 NLRB 1041 (1979); *Cabot Corp.*, 223 NLRB 1388 (1976); *Church Point, supra.*

[53] *Sackett's Welding*, 207 NLRB 1030 (1973).

erced employees while they were engaged in activity protected by Section 7 of the Act in violation of Section 8(a)(1) of the Act. *Sackett's Welding, supra; Courtesy Volkswagen, Inc.*, 200 NLRB 84 (1972).[54]

E. *The Offer of a 10-Cent-Per-Hour Wage Increase*

Respondent on June 7, pursuant to a request of the employees, met with them and listened to their complaints and demands. Jack King then offered the employees a 10-cent-an-hour increase if they agreed to return to work. No mention of the Union was made during the meeting, except that, after the meeting ended, one of the employees said "now we'll go Union." On the picket line Arnita was informed of the results of the meeting, the employees voted on whether to accept the offer or continue the strike, and voted to reject the offer and continue striking. The Union then began supplying picket signs, sent a telegram demanding recognition, and filed a petition the next day.

The General Counsel contends that these facts establish that Respondent has violated Section 8(a)(1) and (5) of the Act by promising benefits to employees and bypassing the Union, in order to undermine the Union's status. I do not agree.

All Respondent was doing in the instant circumstances was to accept the employees' request to meet with them in order to continue the bargaining that had occurred on June 5, when the strike began prior to the Union's appearance. Respondent was merely responding to the employees' demands in an attempt to end the strike.

Althought the Union had made a demand for recognition on June 5, I note that the Union, by Arnita, was aware of this meeting, made no effort to stop it, and in fact conducted a vote among the employees on whether to accept Respondent's offer. Accordingly, whether or not, by virtue of Respondent's conduct on June 5 and 6, it had violated Section 8(a)(1) and (5) of the Act, and was under an obligation to bargain with the Union as of June 7, I find that the Union by its conduct has acquiesced in Respondent's bargaining with the employees. In these circumstances, Respondent has not violated Section 8(a)(1) or (5) of the Act by its meeting with employees and offering them a 10-cent-an-hour increase, and I shall recommend dismissal of this allegation of the complaint.

F. *Denial of Wage Increase to Larry Embler*

The General Counsel argues that Embler was unlawfully denied a wage increase from July through October because of his participation in the strike and activities on behalf of the Union. He relies primarily on the alleged statements made to Embler by Taylor, when he asked about a raise, that Embler had to prove that he was trustworthy and that he had hurt his reputation by going out on strike.

I do not credit Embler concerning these statements allegedly made to him, and instead believe that Taylor's version of these conversations to be more probable and truthful. I therefore find that Taylor did not make the comments attributed to him by Embler, but instead explained to him the reasons why he was not receiving a raise and what he would have to do to obtain one.

I note in this connection that Embler was complaining to Taylor about Godfrey receiving the same salary as he, despite having less seniority than Embler, as far back as April, prior to the strike and prior to any union activity. The explanation given Embler in April and again reiterated in part in the fall, was that the system of raises instituted by Respondent in early 1979 provided for regular evaluations and increases on an employee's anniversary, and that accounted for Godfrey having passed Embler in salary in August.[55] Embler was hired in January 1978, and his regular anniversary evaluation was not due until January 1980. However, since his performance dramatically improved as of November 1979, as a result of his having filled in admirably for Godfrey who was out on disability, Respondent granted him a merit increase in November, 3 months before his regular evaluation was due.

Moreover, the record reveals that a number of other returning strikers and card signers, including Kevin Fitzpatrick, the employee who contacted the Union and distributed many of the authorization cards, received wage increases, after returning to work and prior to Embler having received his increase. Therefore, there is no basis for a finding that Respondent refused to grant wage increases to returning strikers in reprisal for their strike or union activity.

Accordingly, I find that the General Counsel has not established that the Respondent discriminatorily denied Embler an increase, and shall recommend dismissal of this allegation of the complaint.

G. *Respondent's Refusal To Recognize and Bargain With the Union*

The parties stipulated the unit inclusion of 20 employees and the exclusion of employee Nolan. The status of Fitzpatrick, Lund, Dolan, Heim, Rehnberg, and Madia are in dispute.

I find that the record is insufficient to establish that any of the employees in dispute are supervisors within the meaning of the Act.[56]

Although the record establishes that Fitzpatrick, Lund, Heim, and Rehnberg assigned work to employees, the record does not establish the exercise of independent judgment by any of these employees. Lund and Heim had the power to send employees home, but, insofar as the record reveals, this authority was only exercised once. In addition, the procedure involves attempting to

[54] I do not deem it significant that King did not point the gun at the pickets, nor that he made no threat to use said gun. It is admitted by King that he made no attempt to hide the gun, and that in fact he wanted the pickets to be aware of the fact that he had a gun. Thus, it is obvious that the pickets, upon seeing King with the gun drawn while speaking to the driver, reasonably would tend to believe that King was attempting to give them the impression that he might use the gun should the pickets continue to speak to drivers attempting to enter the premises.

[55] The record reveals that August was Godfrey's anniversary date.

[56] Although the job functions and responsibilities of these individuals are similar, not surprisingly the parties have taken positions on their status apparently based on whether they had signed cards. Thus, the General Counsel asserts that Heim and Lund are supervisors, while Fitzpatrick, Dolan, and Rehnberg are not. Respondent takes a contrary position with respect to each individual in dispute.

contact the supervisor at home first prior to exercising such authority. In any event, no evidence was adduced that any of these employees ever effectively recommended discipline, wage increases, or any other change in conditions of employment of employees.[57]

Therefore, I find that the record does not establish that Heim, Lund, Fitzpatrick, Rehnberg, or Dolan were supervisors within the meaning of the Act.[58]

Respondent also contends that Rehnberg should not be considered an employee within the unit, since he had notified Respondent at the end of May that he would be leaving Respondent's employ to accept another job, and his last day of work was to be June 8.

As noted, Rehnberg signed a card on June 5, was terminated by Respondent, and appeared on the picket line until June 8. He did not respond to either of Respondent's reinstatement offers.

It is clear that, on June 5, 6, and 7, Rehnberg was still an employee in the unit. His giving notice to Respondent of his intention to quit on a subsequent date does not affect his status as an employee in the unit on the days in question, all prior to the date of his quitting.[59]

Anthony Madia was employed by Respondent until 12 noon on June 5. He left on that date and did not return to work for Respondent. Although the record is uncertain whether he notified Respondent of his intention to quit on June 5 or June 6, I find this conflict irrelevant to a determination of his status. I find that on June 5, the date of the original demand, he was still an employee in the unit and should be counted in the unit, although he left on that date and did not return. However, on June 6, since Madia notified Respondent of his quitting, he no longer was an employee in the unit.

Accordingly, based on the above analysis, as of June 5, the date of the Union's first demand, Respondent employed 26 employees in the appropriate bargaining unit. The next day, June 6, as well as on June 7, when the Union made its second demand for recognition, Respondent employed 25 employees in the unit.[60]

The record establishes that as of June 5 the Union had obtained 12 authorization cards from Respondent's employees. Therefore, as of the date of the Union's first demand, it did not represent a majority of the employees of Respondent.

However, the next morning, June 6, the Union obtained three authorization cards from unit employees.[61] This brought the Union's total to 15 cards out of a unit of 26 employees, thereby establishing that it represented a majority of Respondent's employees on and after June 6. In addition, on June 7, the Union obtained another card, giving them 16 cards out of 26 employees when a second demand for recognition was made.

Respondent seeks to invalidate a number of these cards for various reasons. It is argued that the cards of Johnson, Fichera, Schiavone, Koehler, and Nolan should not be counted, because they were solicited by Fitzpatrick who Respondent claims to be a supervisor. Since I have previously found that Fitzpatrick was not a supervisor within the meaning of the Act, I need not decide what part Fitzpatrick played in the distribution of cards to these employees, or what affect his participation, if any, in the solicitation of these cards had on these signers.

Respondent also contends those signers who were not called to testify[62] should not be counted because of the extensive violence on the picket line.

There can be no question that the cards were properly authenticated by the solicitors,[63] leaving the only issue that of Respondent's claim that violence on the picket line tainted the execution of these cards. However, with the exception of the card executed by Schiavone, the evidence did not establish that any violence was directed toward these individuals or that any was committed in their presence, prior to their having executed their cards. Accordingly, there is no basis for Respondent's contention that the cards of these individuals should be invalidated because of violence on the picket line.

Schiavone, however, as I have found, while attempting to leave the plant on the morning of June 6, was stopped by Phillips and Olsen, had a punch thrown at him by Phillips, and had a crate thrown under his car by Olsen while being criticized by Phillips for crossing the picket line.

Later on that morning, Schiavone returned to the picket line, was given a card by Fitzpatrick, and signed it in the presence of Phillips and Olsen. While I have some doubts about the validity of this card in view of the circumstances described above, I find that, since the violence directed toward Schiavone was not expressly tied to his executing an authorization card, the evidence is insufficient to establish that the card was coerced. As noted, the violence directed towards Schiavone occurred in the context of his crossing the picket line, and the execution of the card occurred later in the day unaccompanied by any violence or threats. Thus, I shall count the card of Schiavone.

[57] The evidence that some of these individuals discussed the performance of other employees with supervisors does not establish that any recommendation, effective or otherwise, was made by these "alleged" supervisors.

[58] In view of this conclusion, I need not decide whether Heim's temporary removal from the group leader position prior to the strike removed him from that position on the crucial dates in question. I also need not resolve the issue of whether Dolan should be considered a group leader on the dates in question since he had been selected prior to the strike to replace Heim in that position. However, since Dolan clearly did not assume the group leader position prior to the strike and was only training for it, I find that even if the group leaders are found to be supervisors that Dolan did not assume that position as of the first week in June.

[59] *Computed Time Corporation*, 228 NLRB 1243 (1977); *McEwen Manufacturing Company*, 172 NLRB 990 (1968); *Personal Products Corporation*, 114 NLRB 959 (1955); *General Tube Co.*, 141 NLRB 441 (1963).

[60] I am of course including in the unit the employee whom I have previously found to have been discriminatorily discharged by Respondent.

[61] As noted, the Union also obtained a card on June 6 from Brian Nolan, but the parties have stipulated that he was a casual summer employee not includable in the unit.

[62] Fichera, Schiavone, Guinta, Banker, Shapiro, Drouin, Koehler, Olsen, and Nolan.

[63] *McEwen Manufacturing Co., supra.*

Therefore, I find that as of June 6 and continuing on June 7, the Union represented an uncoerced majority of Respondent's employees in an appropriate unit.[64]

Thus, although the Union was not authorized to represent a majority on June 5 when it made its first demand for recognition, it was so designated on June 6, the very next day, and was still so designated on June 7, when it made an additional demand for recognition, this time by telegram.

The Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc., supra,* approved the finding of an 8(a)(5) violation and the issuance of a bargaining order where the unfair labor practices committed by a respondent, has the "tendency to undermine majority strength and impede the election process." 395 U.S. at 613-614.

There can be little doubt, and I so find, that the unfair labor practices found to have been committed by Respondent, most significantly the unlawful discharge of nine employees[65] and the unlawful threat to close or move the plant[66] as well as the other unfair labor practices found, are sufficient to have such a tendency to impede the election process.

Accordingly, I find that Respondent has violated Section 8(a)(1) and (5) of the Act, warranting the issuance of a bargaining order.[67]

Respondent also argues that, in view of the extensive violence committed by the pickets, the bargaining order, even if warranted, should be withheld from the Union.[68]

In *Maywood Plant of Grede Plastics—A Division of Grede Foundries Inc.*,[69] Administrative Law Judge David Davidson analyzed many of the cases dealing with this issue, and concluded that there are five main factors to be weighed in considering whether to deny a bargaining order because of union misconduct in the face of an 8(a)(5) finding that would otherwise require such a remedy. The factors recited are: the extent of the union's interest in pursuing legal remedies; evidence of deliberate planning of the acts of violence and intimidation attributable to the union; whether assaults by union advocates were provoked; the duration of the union's misconduct; and, finally, the relative gravity of the union's misconduct as opposed to that of the company.

The Board did not quarrel with Administrative Law Judge Davidson's analysis that these factors are usually found relevant in such cases, but disagreed with his application of the test to the facts in *Maywood,* and found that a bargaining order was appropriate.

A comparison of the facts in *Maywood* with those present in the instant case leads me to conclude that the case for withholding a bargaining order in *Maywood* was more compelling than it is herein.

Thus, in *Maywood,* the violence committed was more extensive than that committed herein, and most importantly was committed directly by business agents and officials of the Union. In the instant case, no act of violence or even any threats were committed by Arnita or any other union business agent, officer, or official. Moreover, the only act of violence committed in the presence of Arnita,[70] the pushing of Guinta by Olsen, resulted in Arnita rebuking and reprimanding Olsen in front of the other pickets for this action, and warning him not to commit such action in the future.

I find the record insufficient to establish that Olsen was ever appointed by the Union to act as a picket captain or an agent. Although Olsen was a leader of the employees in their presentation of demands to Respondent, once the Union became in charge of the picket line as of June 7, when it distributed signs to employees, Olsen's status *vis-a-vis* the Union was no different than that of any other striker. It appears that, at least for 8(b)(1)(A) purposes, the Union would be held responsible for the conduct of the pickets, since they authorized the picket line, and failed to take affirmative steps to disavow or correct the unlawful conduct of the pickets.[71]

However, it seems that in *Laura Modes* cases, the direct participation of union officials in violent acts or, at the very least, their presence and acquiescence when significant violence occurs is an essential factor to justify the extraordinary remedy of withholding an otherwise appropriate bargaining order. I note that in all of the cases cited by Respondent, particularly the most often-cited cases of *Laura Modes* and *Allou,* union officials were found to have directly participated in the misconduct found sufficient to disqualify the union from receiving a bargaining order.

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[64] I note that, even if Schiavone's card were not counted, Respondent's majority status would not be eliminated, as it still would have had 15 cards on June 6 and 16 cards on June 7.

[65] The Board and the courts have long classified the unlawful discharge of employees, as conduct going "to the very heart of the Act." *Faith Garment Company, Division of Dunhall Pharmaceutical, Inc.*, 246 NLRB 299 (1979); *N.L.R.B.* v. *Entwistle Manufacturing Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

[66] The Board has also held that threats to close operations are "the hallmark of the type of case in which bargaining orders issue." *Patsy Bee, Inc.*, 249 NLRB 976 (1980); *Stereotypers and Electrotypers Union, Denver Local 13 (The Denver Post, Inc.)*, 246 NLRB 858 (1979); *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 235 NLRB 1193 (1978).

[67] Respondent argues that its offers of reinstatement to the discharged strikers within 24 hours of their terminations, coupled with the fact that every discharged employee who requested reinstatement was reinstated, "totally dissipated any possible lingering effect from the allegedly unlawful discharges." Although, as noted, I have found above that Respondent's offers of reinstatement were invalid, even if I were to find to the contrary on this issue, Respondent's assertion as to the effects of such reinstatement on the necessity for a bargaining order is without merit. The Board has repeatedly held that unfair labor practices such as those committed by Respondent, even with immediate recall, and/or no loss of pay, cannot be readily forgotten, and will have a lasting effect on employees. That effect cannot be cured by traditional remedies. The holding of a free and fair election in such circumstances is unlikely if not impossible. *John C. Carey Milling Company,* 218 NLRB 916 (1975); *Chandler Motors, Inc.*, 236 NLRB 1565 (1978); *Zim Textile Corp.*, 218 NLRB 269 (1975); *Vernon Devices, Inc.*, 215 NLRB 475 (1974).

[68] *Laura Modes, supra; Allou Distributors Inc.*, 201 NLRB 47 (1973); *The Dow Chemical Company,* 216 NLRB 82 (1975); *Artcraft Mantel and Fireplace Co.*, 174 NLRB 739 (1969).

[69] 235 NLRB 363 (1978).

[70] I find that, contrary to Respondent's assertions, the record has not established that either the pickets or the Union was responsible for the damage to the plant or the broken windshields of the cars of Bertha and Mahan, or the nails being placed under a truck at Respondent's premises.

[71] *Broadway Hospital, Inc.*, 244 NLRB 341; *Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local Union 327 (Coca-Cola Bottling Works of Nashville)*, 184 NLRB 84 (1970); *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 195, AFL-CIO (McCormack-Young Corporation)*, 233 NLRB 1086 (1977); *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 696 (The Kargard Company)*, 196 NLRB 645 (1972).

In addition, as in *Maywood* and contrary to *Laura Modes*, the Union did express an interest in pursuing legal remedies by filing a petition on June 8 and the instant unfair labor practice charges shortly thereafter.

Moreover, as in *Maywood*, Respondent also engaged in serious and highly provocative misconduct at the picket line. Thus, Respondent violated Section 8(a)(1) of the Act as noted by King's conduct in brandishing a gun on the picket line in response to employees' concerted activity and in striking picketing employees with his van.[72]

Accordingly, considering the misconduct of Respondent as well as the other serious unfair labor practices committed by Respondent, including the discharge of nine strikers and threats to close the plant, which could not have helped but to have prolonged the strike,[73] the misconduct of the pickets is insufficient to justify the extraordinary action of withholding the appropriate bargaining order required to remedy the Company's unfair labor practices.[74]

As the Board pointed out in *Daniel A. Donovan, et al., d/b/a New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973), enfd. 520 F.2d 1316 (2d Cir. 1975):

> We do not condone any picket line violence, and the processes of the Board are available to prevent its recurrence . . . . But we are also reluctant to deprive a substantial group of employees of the benefits of collective bargaining because of the misconduct of a few miscreants. Here, looked at in perspective, there were but few instances of misconduct by a relatively small proportion of strikers,[75] . . . against a background of Respondent's frequent and recurring unfair labor practices. Viewed in that light . . . we have concluded that the extraordinary sanction remedy of withholding an otherwise appropriate remedial bargaining order would not best effectuate the policies of the Act. [*Id.* at 689.]

Therefore, I recommend that Respondent be ordered to bargain with the Union as of June 6.[76]

H. *The Wage Increases and Distribution of Turkeys*

The General Counsel has the burden of proving that Respondent's granting of wage increases and/or the distribution of the turkeys were marked by an antiunion purpose. I find that he has failed to meet this burden.

The turkeys were distributed in November, months after the picketing ended, and was not accompanied by any reference to the Union or the existence of a union campaign. Bertha credibly testified that Respondent's sales increased substantially in October and that he, pursuant to his practice at other plants where he had been a supervisor, felt that it was appropriate to distribute turkeys to employees.

The wage increases also were unaccompanied by any references to the Union, and were consistent with and pursuant to Respondent's policy of periodic evaluations and merit increases established by Bertha in February, shortly after he took over as plant manager.

Accordingly, I find that the General Counsel has failed to meet his burden of establishing that these benefits were granted for the purpose of inducing employees not to support the Union.[77]

However, in view of the fact that I have found that Respondent was under an obligation to bargain with the Union, as of June 6, it was not free to grant any wage increases or other benefits or improvements including the distribution of turkeys without consultation with or bargaining with the Union. Such conduct, therefore, I find to be unilateral changes in terms and conditions of employment of its employees, in violation of Section 8(a)(1) and (5) of the Act.[78]

Upon the foregoing findings of fact and upon the entire record herein and pursuant to Section 10(c) of the Act, I make the following:

CONCLUSIONS OF LAW

1. Respondent Highland Plastics, Inc., is, and at all times material herein has been, an employer engaged in commerce within the meaning of the Act.

2. Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees of Respondent employed at its Newburgh, New York, facility, including cutters, benders, bellers, packers, shippers and welders, but excluding office clerical employees, guards and supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. At all times since June 6, 1979, the Union has been the exclusive representative of the employees in said unit

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[72] I would also note that, even if it were found that these actions of King did not technically constitute an unfair labor practice, they were excessive and provocative, and show that Respondent "at times escalated the activity around the picket line in a manner that does not justify laying the responsibility for the resulting misconduct solely on the shoulders of the Union." *Maywood, supra*, fn. 9 at 366.

[73] In view of Respondent's unlawful refusal to bargain with the Union as well as the other unfair labor practices committed by Respondent, I find as alleged in the complaint, that the strike, although commenced as an economic strike, was converted into an unfair labor practice strike by Respondent's conduct. Noted in this connection is the fact that the employees on June 6 attempted to report for work and were refused entrance to the plant and informed of their termination by Taylor.

[74] *Maywood, supra; Quintree Distributors, Inc.*, 198 NLRB 390, 403 (1972); *Philadelphia Ambulance Service, Inc.*, 238 NLRB 1070 (1978).

[75] It is emphasized again that, in the instant case, nearly all of the violence and threats were committed by one striker, Steve Olsen, who as in *Donovan* was lawfully denied reinstatement by the Employer for the commission of such acts.

[76] The date that the Union obtained its majority status and when the unfair labor practices had commenced. Although the Union made its first demand on June 5, when it did not have majority support, its demand was continuing and justifies a bargaining order on the date it obtained a majority. *Schwab Foods, Inc., d/b/a Scotts IGA Foodliner*, 223 NLRB 394 (1976). I note that, even if the demand were found not to constitute a continuing demand (see *Hedstrom Company, a subsidiary of Brown Group v. N.L.R.B.*, 558 F.2d 1137 (3d Cir. 1977)), the Union made an additional demand on June 7, when it still represented a majority of Respondent's employees, clearly justifying an 8(a)(5) finding and bargaining order on that date.

[77] *The Louis Allis Company (A Division of Litton Industries, Inc.)*, 193 NLRB 7 (1971).

[78] *Taylor Bros., Inc.*, 230 NLRB 861 (1977); *Broadmoor Lumber Co.*, 227 NLRB 1123 (1977); *Fry Foods, supra*.

for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By discharging its employees Michael Phillips, Steve Olsen, Dale Rehnberg, Mark Hayes, Kevin Fitzpatrick, Larry Embler, Tom Dolan, Walter Johnson, and James Fichera for engaging in protected concerted activity and for supporting the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. By threatening to close or move the plant if the Union were selected by the employees as their collective-bargaining representative, and by threatening to discharge employees for engaging in a strike, Respondent violated Section 8(a)(1) of the Act.

7. By brandishing a gun while picketing employees were engaged in protected concerted activity, and by driving an automobile into picketing employees, Respondent has interfered with the lawful strike activities of its employees in violation of Section 8(a)(1) of the Act.

8. By refusing since on and after June 6, 1979, to recognize and bargain collectively with the Union as the exclusive representative of the employees in the unit described above, Respondent has violated Section 8(a)(1) and (5) of the Act.

9. By unilaterally granting wage increases and distributing free turkeys to its employees, without consultation with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

10. The strike which began on June 5, 1979, as an economic strike, was prolonged and converted into an unfair labor practice strike on June 6, 1979, by the conduct of Respondent described above.

11. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in various unfair labor practices, I shall recommend that it cease and desist therefrom[79] and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent made a valid offer of reinstatement to the discharged employees in July 1979, it is not appropriate to order Respondent to offer reinstatement to these employees.

However, since I have found that the strike engaged in by Respondent's employees was converted to an unfair labor practice strike, those strikers who chose not to accept Respondent's offer of reinstatement resumed their status as unfair labor practice strikers. In addition, those strikers who were not discharged and who did not return to work also continued to retain their status as unfair labor practice strikers. Accordingly, I shall recommend that Respondent be ordered to offer reinstatement, upon application, to their former positions of employment, or, if those positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all those employees who participated in the strike which began on June 5, 1979, and who have not been reinstated, dismissing, if necessary, any persons hired as replacements on or after June 6, 1979.[80]

I shall also recommend that Respondent make whole those nine discharged employees for any loss of earnings they may have suffered by reason of the discrimination against them, from the date of their terminations until the dates of their reinstatement or offers of reinstatement.[81]

In addition, I shall recommend that Respondent make whole the striking employees for any loss of earnings they may suffer, should Respondent refuse to reinstate them upon application, by payment to each of a sum of money equal to that which he normally would have earned as wages during the period from 5 days after the date on which he applies for reinstatement to the date of Respondent's offer of reinstatement to him. Backpay shall be computed in both situations described above, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).

I shall also recommend that Respondent be ordered to recognize and bargain with the Union as the exclusive collective-bargaining agent of the employees in the unit found appropriate herein.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[82]

The Respondent, Highland Plastics, Inc., Newburgh, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or threatening to discharge employees for engaging in a strike or in union activities or otherwise discriminating against them in order to discourage them from being or becoming members or supporters of Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union.

(b) Threatening to close or move the plant if the Union is selected as collective-bargaining representative by its employees.

[79] Since the unlawful discharge of striking employees is of such a serious nature and strikes at the very heart of rights intended to be protected by the Act, I shall recommend issuance of a broad cease-and-desist order requiring Respondent to cease and desist from in any other manner infringing upon employees' rights. *Abilities and Goodwill, supra.*

[80] This portion of the remedy shall not apply to Steven Olsen, who was lawfully discharged by Respondent for engaging in picket line violence.

[81] *C & W Mining, supra.* As noted above, Respondent shall not be precluded from avoiding or reducing its backpay obligation by establishing at the compliance stage of this proceeding that some or all of these discriminatees would not have accepted a valid offer of reinstatement made prior to July, or by any other evidence showing the incurrence of a willful loss of earnings. See also *Abilities and Goodwill, supra.*

[82] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

(c) Brandishing a gun while its employees are engaged in protected concerted activity, or driving an automobile into employees while they are picketing.

(d) Refusing to bargain collectively with the Union concerning terms and conditions of employment of its employees, in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees of Respondent, employed at its Newburgh, New York, facility, including cutters, benders, bellers, packers, shippers and welders, but excluding office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

(c) Unilaterally granting wage increases, distributing free turkeys to employees, or otherwise unilaterally changing any other term or condition of employment of its employees, without first notifying the Union and bargaining collectively with it in good faith concerning such proposed changes; provided that nothing herein shall require Respondent to rescind any wage increase or benefit which it has previously granted.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make whole Michael Phillips, Mark Hayes, Steven Olsen, Dale Rehnherg, Kevin Fitzpatrick, Larry Embler, Tom Dolan, Walter Johnson, and James Fichera, for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section herein entitled "The Remedy."

(b) Upon application, offer immediate and full reinstatement to their former positions of employment or, if these positions are no longer available, to substantially equivalent employment, without prejudice to their seniority or other rights and privileges, to all those employees who participated in the strike which began on June 5, 1979, and who have not been reinstated, dismissing, if necessary, any persons hired as replacements on or after June 6, 1979. Respondent shall also make whole those employees for any loss of earnings they may suffer, by reason of Respondent's refusal if any, to reinstate them in accordance with the terms of this Order, in the manner set forth in the section herein entitled "The Remedy."

(c) On request, bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to the analysis of the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Newburgh, New York, copies of the attached notice marked "Appendix."[83] Copies of the notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by it, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations not specifically found herein.

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[83] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."